IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 51 51

PETE DARR,
Petitioner,

VERSUS

C. P. BURFORD, Warden, Oklahoma State Penitentiary,
Respondent.

BRIEF OF PETITIONER

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NOVEMBER, 1949.

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BRIEF AND ARGUMENT

MAY IT PLEASE THE COURT:

The United States District Court for the Eastern District of Oklahoma, without expressing any opinion upon the merits of petitioner's contentions, denied relief, and discharged the writ, for the sole reason he had failed to exhaust his state remedies. Dated April 22, 1948.

From which order an appeal was taken to the United States Circuit Court of Appeals, Tenth Circuit, Denver, Colorado, on May 1, 1948. Judgment is found at Tr. 16.

The opinion of the United States Circuit Court of Appeals, Tenth Circuit, was entered January 31, 1949 (Tr. 53). From this judgment petitioner brings his petition for *certiorari* before this Honorable Court, and prays for a review of said judgment, which order for review was granted June 6, 1949.

JURISDICTION

Jurisdiction of the Court to issue the writ applied for is invoked under Title 28, U.S.C.A. 453.

We quote from the Memorandum and Order of the Honorable Eugene Rice, United States District Judge as follows:

> "Sufficient it is to say that his petition was adequate to invoke the jurisdiction of this court to issue the writ. 28 U.S.C.A. 453" (Tr. 16).

And because a substantial Federal question as to restraint without due process of law under the 14th Amendment to the Constitution of the United States seemed to be presented.

Ex parte Hawk, 321 U.S. 114-117;
Whittaker v. *Johnston*, 85 Fed. (2d) 199.

STATEMENT OF THE CASE

In the interest of brevity we give a short synopsis of the trial and conviction of petitioner in the State Court of

Oklahoma, and to bring before this Court the denial of "Due Process of Law" to petitioner under the 5th and 14th Amendments to the Constitution of the United States and the Bill of Rights contained in the Constitution of the State of Oklahoma.

Petitioner was charged by two separate and distinct informations with the capital crime of robbery with firearms, issued out of the District Court of Lincoln County, Oklahoma. On January 9, 1931, petitioner, who had previously waived his preliminary hearing, was brought to Chandler, Oklahoma, from the State Penitentiary at McAlester, Oklahoma, and placed in jail and held incommunicado until the morning of January 13, on which date the two said cases were set for trial; that on said date, petitioner made application to the District Court for a continuance in order to prepare for trial, subpoena witnesses; that he had just been informed his counsel would not appear for him in the trial, and that other counsel had just been assigned to him and asked for time to prepare his defense; that he was without funds to employ counsel or to subpoena witnesses on account of his incarceration in the State Penitentiary (Tr. 9-10).

Petitioner alleges on January 13, 1931, the court found that he was without counsel and without funds to employ counsel, and on said date appointed counsel to defend him and continued the case until the following morning.

In petitioner's distressful and totally unprepared condition he was forced to trial on the following day, to-wit:

January 14th, without even one witness in his behalf, and confronted by a hostile community, and 34 witnesses to testify against him, and petitioner was not furnished with the list of witnesses to be used in chief against him, together with their postoffice addresses, as required under the Bill of Rights, of the Oklahoma Constitution.

That on said date, January 14th, petitioner was tried before a jury empanelled on said date, his appointed counsel had no time to prepare for trial, and the jury found him guilty, and assessed his punishment at confinement in the State Penitentiary for a term of 40 years at hard labor; and the judge set January 16th, 1931 for date of sentence; but petitioner was sentenced on January 15th (Tr. 6).

That thereafter and on January 14th, 1931, petitioner was brought before the same court and jury empanelled to try him on the second charge; that out of the 19 witnesses for the State, the State used only two, and petitioner had none. Petitioner was held in the jail at Chandler, Oklahoma, awaiting the verdict of the jury, when the County Attorney visited him in the jail, and suggested to him that he plead guilty. This the petitioner refused to do. The County Attorney then informed petitioner, if he would plead guilty he could obtain for him a sentence of only 10 years to run concurrently with the former sentence of 40 years (Tr. 22); petitioner still refused to plead guilty. Then the County Attorney told him if he did not plead guilty he stood to get the electric chair, on account of the bitter feeling against him. It was then through fear of receiving the death penalty that petitioner

agreed to enter a plea of guilty. Petitioner did not and could not under those conditions waive any of his Constitutional rights; that on said date petitioner appeared before the court to enter his plea of guilty; that after being informed by the court that he would sentence him to a term of 40 years to run consecutively with the first sentence of 40 years, petitioner attempted to withdraw his plea of guilty; but the court refused to allow him to withdraw his plea and immediately sentenced him to a term of 40 years at hard labor.

SPECIFICATIONS OF ERROR

The reasons relied on for the allowance of the Writ, show the errors intended to be urged and particularly the Honorable Circuit Court of Appeals, Tenth Circuit, Denver, Colorado, in its majority opinion failed to give due consideration to the merits of the case.

ARGUMENT

Under the caption "Statement of the Case," a brief synopsis is given of the salient points of petitioner's trial and conviction, and his plea of guilty, which the undisputed facts reveal was under duress, which is the basis of our contention that both judgments were contrary to the Bill of Rights of the Oklahoma Constitution, and in contravention of the 5th and 14th Amendments to the Constitution of the United States, and that said judgments were therefore void for want of due process of law.

From Article 2, Section 21, Bill of Rights, 1941 Statutes of Oklahoma (R. 5-37), we quote in part:

> "Accused shall be informed of the nature and cause of the accusation against him, and have a copy thereof, and be confronted with the witnesses against him, and have compulsory process for obtaining witnesses; and in capital cases, at least two days before the case is called for trial, he shall be furnished with a list of witnesses that will be used in chief against him, together with their postoffice addresses."

Authenticated copy of record fails to show appellant was served with a list of witnesses.

Does the record and evidence disclose due process of law? Article 2, Section 7, of the Oklahoma Constitution, provides:

> "No person shall be deprived of life, liberty or property, without due process of law."

This principle is older than written constitutions. The phrase "due process of law" as used in the Bill of Rights is synonymous with the "Law of the Land" as found in Magna Charta. By the "Law of the Land" is clearly intended the general law which hears before it condemns, which proceeds upon inquiry and renders judgment, only after a fair and legal trial.

Pete Darr, appellant did not have a fair and legal trial, and was tried in contravention of the 5th and 14th Amendments to the United States Constitution which read in part as follows:

Fifth Amendment:

> "No person shall be deprived of life, liberty, or property, without due process of law," and

The 14th Amendment provides in part:

"Nor shall any State deprive any person of life, liberty or property, without due process of law."

Appellant was transported from the State Penitentiary by order of the court, to Chandler, Lincoln County, Oklahoma, on January 9th, 1931, and placed in jail, where he remained incommunicado until the morning of January 13th, the day the cases were set for trial; that during all the intervening time, appellant had no counsel to advise him and made no preparation for trial; that appellant did not know the appointed counsel (see bottom of page 36 of Record).

In support of our contention, as above stated, we quote:

Constitutional Law:

"Denial of opportunity to consult with counsel on any material step after indictment or similar charge and arraignment violates the Fourteenth Amendment."

U.S.C.A., and quoting further:

"Denial of effective assistance of counsel in prosecution in state court violates due process."

U.S.C.A., Const. Amend. 14.

We herewith quote from the body of the opinion of the case of *Henry Hawk* v. *Neil Olson, Warden of the State Penitentiary at Lancaster, Nebraska*, reported in 90th Law ed. 61, which reads:

"Your petitioner had no consultation whatsoever with either of the aforesaid public officials regarding his defense; they picked the jury and testimony was adduced and continuance or recess taken until the fol-

lowing morning * * *. Petitioner claimed protection of the Fourteenth Amendment.

"These facts, if true, we think, set out a violation of the Fourteenth Amendment * * *.

"Petitioner states a good cause of action when he alleges facts which support his contention that through denial of asserted constitutional rights, he has not had the kind of trial in a state court which the due process clause of the Fourteenth Amendment requires."

Supporting our contention that appellant was forced to trial, without sufficient time to prepare for trial, although being charged with two capital crimes, and having no counsel of his own choosing, and his request for continuance in order to subpoena witnesses from another county, we cite Exhibit A, page 9 of the Record. Said Application bearing date January 13th, 1931, Case No. 2199; and Application for Continuance in Case No. 2197, same date at (R. 10) Exhibit B. Order appointing counsel January 13th (R. 10). Petitioner made application to have two witnesses subpoenaed from another county to testify in his behalf. Exhibit C (R. 12-14). Said subpoenaes were issued January 13th, and returned marked "Persons not found in said county."

In support of point two, we quote *Powell* v. *Alabama*, 287 U.S. 45, 158 L. ed. 84:

Syllabus 4:

"The right of one charged with crime to be represented by counsel includes a fair opportunity to be represented by counsel of his own choice."

Syllabus 5:

"One charged with crime is as much entitled to assistance of counsel in preparing for trial as at the trial itself."

And we further quote *Glasser* v. *U. S.*, 315 U.S. 60, 86 L. ed. 681:

> "The right to counsel guaranteed by the Constitution contemplates the services of an attorney *devoted solely to his client.*
>
> *"Even as we have held the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law, contrary to the 14th Amendment. Powell* v. *Alabama*, 287 U.S. 45, *supra.*"

From the case of *Lewis Lutz* v. *Joseph E. Ragen, Warden of the State Penitentiary of Illinois*, 89 L. ed. 1348, 325 U.S. 768, we quote Syllabus 3:

> "CONSTITUTIONAL LAW —DUE PROCESS—DENIAL OF ASSISTANCE OF COUNSEL.
>
> "Due process requires that the defendant on trial in a state court upon a serious criminal charge and unable to defend himself, shall have the benefit of counsel and that he shall not be forced into trial with such expedition as to deprive him of the effective assistance of counsel."

In the case of *Baker* v. *State* (Okla. Cr.), 130 Pac. 820, in an opinion by Judge Thomas Doyle, of the Criminal Court of Appeals of Oklahoma, we quote:

> "The right to be heard by counsel would in the language of Saint Paul. I Cor. 13, 'become as sounding brass, or tinkling cymbal' if it did not include the right to a full and confidential consultation with counsel, with no other persons present."

The court appointed M. A. Cox, attorney to represent appellant, on January 13th, after finding petitioner was

without counsel or funds to employ counsel, and continued the case until the following day. Appellant was forced to trial without preparation and without a witness in his behalf. In support of the above (R. 38), we quote from the case of *Commonwealth* v. *O'Keefe*, 148 Atl. 75, Syllabus 1:

> "Action of a trial court in forcing defendant to trial on day of arrest notwithstanding counsel's statement regarding impossibility of being prepared for trial deprived defendant of constitutional right."

Justice Sutherland quotes with approval a portion of an opinion by the Supreme Court of Pennsylvania, in the above case:

> "It is vain to give an accused a day in court with no opportunity to prepare for it, or to guarantee him counsel without giving the latter the opportunity to acquaint himself with the law or facts."

Syllabus 2:

> "Constitutional law, due process of law requires ample notice to accused and sufficient time, to secure counsel and prepare for defense."

We quote from *Tompkins* v. *Missouri*, 323 U.S. 485:

> "The defendant needs counsel and counsel needs time.",

Quoting from *State ex rel. Tucker* v. *Davis et al.* (Okla. Cr.), 130 Pac. 962:

> "There is no such thing as due process of law, if a party has been deprived of an opportunity to prepare for trial. * * *"

In the case of *Ex parte Stinnett* (71 Okla. Cr.), 110 Pac. (2d) 310, opinion by Judge Thomas Doyle, we quote:

Syllabus by the court. Sec. 2:

> "In our opinion the Constitutional right to be represented by counsel and the right in capital cases, at least two days before the case is called for trial to be furnished with a list of witnesses, together with their post office addresses are essential to *due process of law*, guaranteed the citizen by Sec. 7, Bill of Rights. We are inclined to think that a conviction had by a denial of these constitutional rights simply amounts to judicial lynch law."

We further contend that petitioner was convicted in contravention of the 5th and 14th Amendments to the Constitution of the United States. In support of our contention the Record discloses that petitioner was tried on the first charge on January 14th and jury empanelled on said date; that he had no counsel of his own choosing and his appointed counsel had no time to prepare for trial; that the jury returned a verdict of guilty and assessed punishment in the penitentiary for a term of 40 years at hard labor and the judge set January 16th for date of sentence, but petitioner was sentenced on January 15th (R. 16). The offense charged was a serious one. The maximum punishment therefor was death or life imprisonment at hard labor.

When the life of a man hangs in the balance, he is entitled to the fullest measure of due process of law, and the aid of counsel at every step of the proceedings to guide him along the complicated labyrinths of the law.

We assert there was a flagrant denial under the due process clause afforded petitioner, on account of the fact he was held incommunicado in the county jail from Jan-

uary 9th, to January 13th, 1931, believing his counsel would appear for him, on which date the two said cases were set for trial; when he was informed his counsel would not appear, and on said date the court found petitioner was without funds and appointed counsel to defend him, and denied plaintiff's plea for a continuance in order to prepare for trial (Tr. 10), which plea was made on January 13th. In overruling plaintiff's plea for continuance, the court states that "Plaintiff had not exercised due diligence."

Thereafter, and on January 14th, 1931, petitioner was brought before the same court at Chandler, Oklahoma, on the second charge of robbery with firearms, and jury empanelled to try said cause. The State introduced two witnesses and petitioner could introduce none.

Petitioner was held in jail at Chandler, Oklahoma, awaiting the verdict, and on the following morning the County Attorney visited him, and suggested that petitioner plead guilty, and petitioner refused. The County Attorney then informed petitioner if he would enter a plea of guilty, he could obtain for him a sentence of only ten years to run concurrently with the former sentence of 40 years. Petitioner still refused to plead guilty. Whereupon the County Attorney informed him if he did not plead guilty to said charge he stood to get the electric chair on account of the bitter feeling against him; and further informed petitioner that the court or the jury could, upon conviction of the crime with which he was charged, assess the death penalty against him. This fact was testified to by petitioner on

February 8, 1948, before Honorable Eugene Rice, U. S. District Judge, and no denial was made of this allegation (Tr. 22-23). This startling disclosure of the law, under which petitioner was being tried, horrified your unlearned petitioner, and deprived him of his reason and judgment, and left him subservient to the suggestions of the County Attorney, and while laboring under such feeling of terror that he might receive the death sentence, and relying on the promises of the County Attorney, he agreed to enter a plea of guilty. Petitioner was thus coerced into pleading guilty to the last named charge and before the jury returned a verdict. Petitioner not only was coerced into pleading guilty under fear of receiving the death penalty but was coerced into pleading guilty by the alleged community hostility against him.

Petitioner appeared before the court on the same date and entered his involuntary plea of guilty to the charge; that after being informed by the court, that he would sentence him to a term of 40 years at hard labor to run consecutively to the 40 years already imposed upon him, petitioner attempted to withdraw his guilty plea; but the court denied said plea and immediately sentenced petitioner to a term of 40 years in the State Penitentiary at McAlester, Oklahoma, on the last named charge to run consecutively as to the first sentence of 40 years already imposed upon him.

Rice v. *Olson*,
324 U.S. 786;

Kercheval v. *United States*,
274 U.S. 220;

Jack Walker v. *James A. Johnston*,
85 L. ed. 830, 312 U.S. 275;

Glasser v. *United States*,
315 U.S. 60;

Smith v. *O'Grady*,
312 U.S. 329;

State v. *Brown*,
266 Pac. (2d) 475;

Williams v. *Kaiser*,
323 U.S. 471;

Moore v. *Dempsey*,
261 U.S. 86;

Von Molke v. *Gillies*,
332 U.S. 708;

De Meerleer v. *Michigan*,
329 U.S. 663.

Appellant states he was not only coerced into pleading guilty in the last numbered charge by the statements made to him by the County Attorney, but was coerced by the alleged community hostility against him; and therefore did not waive any of his constitutional rights. We believe it would therefore be a strain on credulity to believe appellant voluntarily pleaded guilty and while the jury was still deliberating.

We cite the case of *Von Molke* v. *Gillies*, opinion dated January 19, 1948, 332 U.S. 708.

This case we deem very essential, and of great importance for the correct and legal determination of the case before this Honorable Court. For that reason, we earnestly suggest that the Court give its most serious consideration to this opinion in its entirety.

Jack Walker, petitioner v. *James A. Johnston, Warden, United States Penitentiary, Alcatraz, defendant*, 85 L. ed. 830, Syllabus 4:

"One convicted of a crime upon a plea of guilty without having the aid of counsel is deprived of a constitutional right if he did not voluntarily waive his right to counsel, or if he was deceived or coerced by the public prosecutor into entering a plea of guilty."

"In a state prosecution, a conviction on a plea of guilty obtained by a trick, will not support a conviction."

Smith v. *O'Grady*,
85 L. ed. 859.

From the case of *State* v. *Brown* (Okla. Cr.), 266 Pac. (2d) 475, we quote Syllabus 2:

"PLEA OF GUILTY.

"Plea of guilty should be entirely voluntary and be made by one competent to know the consequences thereof. Plea of guilty should not be accepted by a court until the defendant has been fully advised of his rights and the consequences thereof."

Albert Smith v. *Joseph O'Grady, Warden*, 312 U.S. 329, 85 L. ed. 859:

"That he be given proper opportunity to defend himself but was rushed to the penitentiary where his ignorance, confinement and proverty precluded the possibility of an appeal in order to challenge the procedure by regular process of appeal."

We also quote *Johnston* v. *Fred Zerbst, Warden*, 82 L. ed. 1461:

Syllabus:

"*Habeas corpus* is an available remedy to one who without having waived his right to assistance of counsel, has been convicted and sentenced, and to whom

expiration of time has rendered relief by an application for a new trial or by appeal unavailable."

Quoting further from the case of *Johnston* v. *Zerbst*, in the body of the opinion, the court said:

"The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost justice will not still be done. It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty wherein the prosecution is presented by experienced and learned counsel.

"The Sixth Amendment withholds from Federal Courts in all criminal proceedings the power and authority to deprive an accused of his life or liberty unless he waives the assistance of counsel. *He requires the guiding hand of counsel at every step in the proceeding against him.*"

The Criminal Court of Appeals denied the original writ solely on the basis of certified copies made by the Clerk of Lincoln County, Oklahoma, which were never authenticated by the trial judge. No transcript was ever made of the proceedings of the trial.

Petitioner had no funds with which to make an appeal from his conviction and no friends to aid him and was rushed to the penitentiary and had no opportunity to appeal.

This unfortunate person is uneducated, illiterate, having lived on a tenant farm in the Chickasaw Nation; left without a father at the age of 14 years, with five younger children and mother dependent upon him for support.

Johnston v. *Zerbst*,
304 U.S. 458-66;

Moore v. *Dempsey*,
261 U.S. 86;

Williams v. *Kaiser*,
323 U.S. 471.

APPELLANT CONTENDS that he exhausted his State remedies before applying to the Federal Court for writ of *habeas corpus*.

Under authority of Congress, our Federal Courts have liberalized jurisdiction in *habeas corpus* proceedings, and in support of this fact, we quote from *Ex parte Hawk* v. *Olsen*, 321 U.S. 144, Syllabus 8:

> "Where resort to state court remedies has failed to afford full and fair adjudication of federal contentions raised by one detained under state court judgment of conviction, either because state affords no remedy or because in particular case remedy afforded by state law proves in practice unavailable or seriously inadequate, *a federal court should entertain petition for habeas corpus*, but in such case petitioner should proceed in federal district court before resorting to United States Supreme Court."

In the body of the opinion, the Court said:

> "Since relief was denied petitioner Hawk in the above cause, for the reason he had failed to exhaust all his state remedies, the same Henry Hawk filed a writ of *certiorari* to the Supreme Court of Nebraska, which order denying a writ of *habeas corpus* was affirmed by said Supreme Court of Nebraska, and the petitioner brings *certiorari*." [Reversed and remanded, 324 U.S. 839; opinion by Justice Reed].

Frank v. *Mangum*, 237 U.S. 309, which we quote in part:

> "This court has recognized that *habeas corpus* in the Federal Courts of one convicted of a criminal offense is a proper procedure 'to safeguard the liberty of all persons within the jurisdiction of the United States against infringment through any violation of the Constitution,' even though the events which were alleged to infringe did not appear on the face of the record of his conviction."

This, we deem a very important case in favor of appellant, not only conclusive that he has exhausted his state remedies, but applies to the various phases of his case, set forth in points herein designated and heretofore referred to.

We quote further the case of *Whitaker* v. *Johnston*, 85 Fed. (2d) 199, Syllabus 2:

> "Petition for writ of *habeas corpus* from Circuit Court of Appeals was denied where it had not been made in first instance in District Court of United States (Wilbur, Circuit Judge). It has already been pointed out this is the proper procedure. *Ex parte Davis*, 54 Fed. (2d) 723."

We quote herewith Syllabus 1 from the case of *Frank Moore et al.* v. *E. H. Dempsey, Keeper, Arkansas State Penitentiary*, 261 U.S. 86, 67 L. ed. 543:

> "The corrective process afforded by the court in case alleged murderers are rushed to conviction through counsel, judge and jury being swept to the fatal end by an irresistible wave of public opinion so that no trial in the true sense of the word was offered, will not, where such measures have been appealed to without affording relief prevent a Federal Court from issuing a writ of *habeas corpus*."

The above case was appealed from an order of the District Court of the United States for the Eastern District

of Arkansas, dismissing a writ of *habeas corpus* to secure release of prisoner after conviction of murder. Opinion by Justice Holmes.

In supporting further our contention that our Federal Courts have liberalized the use of *habeas corpus*, and as a result thereof a prisoner in custody may have a judicial inquiry into the very truth and substance of the causes of his detention, we quote *Johnston* v. *Zerbst*, 304 U.S. 458-466, in part:

> "These principles must be construed, however, and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. *The scope of inquiry in the habeas corpus proceedings has been broadened — not narrowed since the adoption of the 6th Amendment.* In such a proceeding it would be *clearly erroneous to confine the inquiry to the proceedings and judgment of a trial court* and *the petitioned court has the power to inquire with regard to the jurisdiction of the inferior court*; either in respect to the subject matter or to the person, even if such inquiry (involves) an examination of facts outside of, but not inconsistent with the record.
>
> "Congress has expanded the rights of a petitioner for *habeas corpus* and the 'effect is to substitute for the bare legal review that seems to have been the limit of judicial authority under the common law practice.' "

From the recent case of *Tony Marino* v. *Joseph E. Ragan, Warden Illinois State Penitentiary*, 68 S. Ct. 240, we quote:

> "This case sharply points up a much larger problem of growing concern to this Court, than merely the disposition to be made of Marino's petition in view of the state's confession of error. I agree that relief is due him and I join in the Court's opinion."

From the body of the opinion:

"The exhaustion of state remedies rule should not be stretched to the absurdity of requiring the exhaustion of three separate remedies when at the outset a petitioner cannot intelligently select the proper way, and in conclusion he may find only that none of the three is appropriate or effective. That each is severely restricted is clear. That any one is available as a matter of right is by no means clear and even if each has a limited function exclusive of the other two, it may be that no one is adequate in a case where petitioner must show combination of facts to establish a violation of his constitutional rights.

"If the federal guarantee of due process in a criminal trial is to have real significance in Illinois, it is imperative that men convicted in violation of their constitutional rights, have an *adequate opportunity* to be heard in court.

"This opportunity is not adequate so long as they are required to ride the merry-go-round of *habeas corpus* and writ of error before getting a hearing in federal court. Consequently as far as I am concerned, the Illinois remedies are exhausted here apart from the State's confession of error. I also think that until the State affords a reasonable, clear and adequate means for presenting and disposing of such questions as *Marino's case* involves, this Court should no longer require exhaustion of its present scheme of ineffective and inadequate remedies before permitting resort to the federal district courts sitting in Illinois. We should neither delay nor deny justice nor clog its administration with so useless and harmful a procedural strangling of federal constitutional rights."

We cite with special emphasis the very recent case of *Wade* v. *Mayo*, 334 U.S. 672, which appears to be the basis of the dissenting opinion of Chief Judge Orie L. Phillips, which opinion appears as Pages 48-52 of the Record.

The opinion rendered in this case is a divided opinion. The majority opinion by two circuit judges affirmed the judgment of the U. S. District Court for the Eastern District of Oklahoma, and the dissenting opinion by the Chief Judge, in which opinion he dissents from the majority opinion, and in support of said dissenting cites the following cases: *Wade* v. *Mayo*, 334 U.S. 672, which opinion came down June 14, 1948; and *Powell* v. *Alabama*, 287 U.S. 45, which is oftentimes quoted in cases of like nature, wherein the accused is forced by a state to trial in such a way as to deprive him of effective assistance of counsel in violation of the Fourteenth Amendment; and further that the court below refused to consider Darr's petition on its merits; but for the only reason petitioner had not exhausted his State remedies.

CONCLUSION

In conclusion, we aver that we have cited ample authorities to support each and every claim of appellant; that he is entitled to be heard by this Honorable Court, and petitioner respectfully prays that this Court, as the final arbiter of questions arising under the 5th and 14th Amendments to the Constitution of the United States, as well as the Constitution of Oklahoma, will review the judgment of the court below and find and determine that petitioner did not have a fair and legal trial under the 5th and 14th Amendments to the Constitution of the United States and under the Constitution of the State of Oklahoma, and grant him the relief for which he prays.

Respectfully submitted.

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NOVEMBER, 1949.